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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

8 IN RE: THE REPUBLIC OF ECUADOR, No. C-10-80225 MISC CRB (EMC)  
9 Applicant,

10 For the Issuance of a Subpoena for the Taking  
of a Deposition and the Production of  
11 Documents in a Foreign Proceeding Pursuant  
to 28 U.S.C. § 1782.

**ORDER GRANTING REPUBLIC OF  
ECUADOR'S EX PARTE  
APPLICATION FOR THE ISSUANCE  
OF A SUBPOENA**

**(Docket No. 1)**

15 Currently pending before the Court is the Republic of Ecuador’s (“ROE”) ex parte  
16 application for the issuance of a subpoena pursuant to 28 U.S.C. § 1782. The ROE seeks the  
17 issuance of a subpoena to Diego Fernando Borja Sanchez, who is purportedly a resident in this  
18 District. The proposed subpoena reflects that the ROE seeks both Mr. Borja’s testimony as well as  
19 the production of documents in his possession, custody, or control. The ROE asserts that this  
20 information is highly relevant to an international arbitration which Chevron Corporation initiated  
21 against the ROE pursuant to a bilateral investment treaty between the ROE and the United States.  
22 See Bloom Decl., Ex. 19 (notice of arbitration). In the arbitration, Chevron asserts that the ROE  
23 abused the justice system in connection with lawsuits taking place in the ROE against Chevron,  
24 including the *Lago Agrio* lawsuit, in which a group of Ecuadorians assert claims against Chevron  
25 for, *inter alia*, violations of an environmental law. See *In re Chevron Corp.*, No. M-19-111, 2010  
26 U.S. Dist. LEXIS 47034, at \*5-6, 10-11 (S.D.N.Y. May 10, 2010); Docket No. 19 (Not. ¶ 4)  
27 (alleging, *inter alia*, that the ROE’s “judicial branch has conducted the Lago Agrio Litigation in  
28 total disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due

1 process and natural justice rights, and in apparent coordination with the executive branch and the  
2 Lago Agrio plaintiffs"). Having considered the ROE's papers and accompanying submissions, the  
3 Court hereby **GRANTS** the application.

4 **I. DISCUSSION**

5 A. Legal Standard

6 The ROE's request for relief is brought, as noted above, pursuant to 28 U.S.C. § 1782.  
7 Under § 1782,

8 [t]he district court of the district in which a person resides or is found  
9 may order him to give his testimony or statement or to produce a  
10 document or other thing for use in a proceeding in a foreign or  
international tribunal, including criminal investigations conducted  
before formal accusation. The order may be made . . . upon the  
application of any interested person and may direct that the testimony  
or statement be given, or the document or other thing be produced,  
before a person appointed by the court. By virtue of his appointment,  
the person appointed has power to administer any necessary oath and  
take the testimony or statement. The order may prescribe the practice  
and procedure, which may be in whole or part the practice and  
procedure of the foreign country or the international tribunal, for  
taking the testimony or statement or producing the document or other  
thing. To the extent that the order does not prescribe otherwise, the  
testimony or statement shall be taken, and the document or other thing  
produced, in accordance with the Federal Rules of Civil Procedure.

17 28 U.S.C. § 1782(a). As reflected by the language of § 1782, its purpose is to provide federal-court  
18 assistance in the gathering of evidence for use in a foreign tribunal. *See Intel Corp. v. Advanced*  
19 *Micro Devices, Inc.*, 542 U.S. 241, 247 (2004); *see also Schmitz v. Bernstein Liebhard & Lifshitz*,  
20 LLP, 376 F.3d 79, 84 (2d Cir. 2004) (noting that § 1782 has "twin aims," *i.d.*, "providing efficient  
21 means of assistance to participants in international litigation in our federal courts and encouraging  
22 foreign countries by example to provide similar means of assistance to our courts") (internal  
23 quotation marks omitted).

24 A district court is authorized to grant a § 1782 application

25 where (1) the person from whom the discovery is sought resides or is  
26 found in the district of the district court to which the application is  
made, (2) the discovery is for use in a proceeding before a foreign

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1                   tribunal, and (3) the application is made by a foreign or internal  
2                   tribunal or “any interested person.”<sup>[1]</sup>

3 *In re Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034, at \*15.

4                   However, simply because a court has the authority under § 1782 to grant an application does  
5                   not mean that it is required to do so. *See Intel*, 542 U.S. at 264. The Supreme Court has identified  
6                   several factors that a court should take into consideration in ruling on a § 1782 request:

7                   (1) whether the material sought is within the foreign tribunal’s  
8                   jurisdictional reach and thus accessible absent Section 1782 aid; (2)  
9                   the nature of the foreign tribunal, the character of the proceedings  
10                  underway abroad, and the receptivity of the foreign government or the  
11                  court or agency abroad to U.S. federal-court jurisdictional assistance;  
12                  (3) whether the Section 1782 request conceals an attempt to  
13                  circumvent foreign proof-gathering restrictions or other policies of a  
14                  foreign country or the United States; and (4) whether the subpoena  
15                  contains unduly intrusive or burdensome requests.

16                  *Chevron*, 2010 U.S. Dist. LEXIS 47034, at \*16; *see also Intel*, 542 U.S. at 264-65.

17                  B.     Ex Parte Proceeding

18                  Before addressing the merits of the ROE’s § 1782 request, the Court discusses first the ex  
19                  parte nature of the ROE’s request for relief. That is, ROE has asked for issuance of a subpoena to  
20                  Mr. Borja without giving notice of its request for relief either to Mr. Borja or to the parties involved  
21                  in the underlying international arbitration, including Chevron.

22                  In its papers, the ROE has explained that it has proceeded without giving notice to Mr. Borja  
23                  out of fear that “he might elect to leave this judicial district should he be made aware of the instant  
24                  Application because he is served with the subpoena.” App. at 2 n.1. The ROE contends that this  
25                  fear is justified based on an alleged conversation that Mr. Borja had with an associate, Santiago  
26                  Escobar. *See id.*; *see also* Bloom Decl., Ex. 40, at 3-4 (transcript of alleged conversation); *id.*, Ex.  
27                  45, at 1 (investigation conducted for *Lago Agrio* plaintiffs). Presumably, the ROE has not given  
28                  Chevron notice of its request for relief because it has some concerns that Chevron might alert Mr.

26                  <sup>1</sup> The Supreme Court has held that § 1782 does not contain a “foreign-discoverability  
27                  requirement” – *i.e.*, there is no requirement that the information sought be discoverable under the law  
28                  governing the foreign proceeding. *Intel*, 542 U.S. at 253. The Court has further held that there is no  
                requirement that a § 1782 applicant show “United States law would allow discovery in domestic  
                litigation analogous to the foreign proceeding.” *Id.* at 263.

1 Borja of the possibility of a subpoena. *See Memo.* at 13 (asserting that “Chevron has . . . apparently  
2 advised Mr. Borja that he will likely be a witness on their behalf at the [international arbitration]”).

3 The Court does not make any ruling with respect to whether the ROE’s fears or concerns are  
4 justified. Even if they were not, the ROE correctly points out that it is common for “the process of  
5 presenting the request to a court and to obtain the order authorizing discovery” to be conducted ex  
6 parte. *In re Letter of Request from Supreme Court*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991). “[S]uch  
7 ex parte applications are typically justified by the fact that the parties will be given adequate notice  
8 of any discovery taken pursuant to the request and will then have the opportunity to move to quash  
9 the discovery or to participate in it.” *Id.*; *see also In re Letters Rogatory from Tokyo Dist.*, 539 F.2d  
10 1216, 1219 (9th Cir. 1976) (in discussing § 1782, noting that “Letters Rogatory are customarily  
11 received and appropriate action taken with respect thereto ex parte” and stating that “[t]he witnesses  
12 can and have raised objections and exercised their due process rights by motions to quash the  
13 subpoenas”); *In re Chevron Corp.*, No. M-19-111, slip. op. at 1 (S.D.N.Y. Aug. 6, 2010) (located at  
14 Bloom Decl., Ex. 54) (noting that “[a]pplications pursuant to 28 U.S.C. § 1782 frequently are  
15 granted *ex parte*”; adding that, “[w]here, as here, the application is for the issuance of subpoenas, no  
16 substantial rights of the subpoenaed person are implicated by such action, as the subpoenaed person,  
17 once served, is entitled to move to quash or modify the subpoenas”).

18 Because the Court’s order here does not foreclose Mr. Borja, Chevron, or any other person or  
19 entity involved in the international arbitration from contesting the subpoena once issued, the Court  
20 shall allow the ROE to proceed with this application ex parte.

21 C. Authority to Issue Subpoena

22 As stated above, a district court is authorized to grant a § 1782 application  
23 where (1) the person from whom the discovery is sought resides or is  
24 found in the district of the district court to which the application is  
25 made, (2) the discovery is for use in a proceeding before a foreign  
tribunal, and (3) the application is made by a foreign or internal  
tribunal or “any interested person.”

26 *In re Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034, at \*15. The Court has reviewed the ROE’s  
27 application and has preliminarily determined that the statutory requirements have been satisfied.  
28 First, the ROE has made a *prima facie* showing that Mr. Borja lives in this District. *See* Bloom

1 Decl., Ex. 45) (investigation conducted for *Lago Agrio* plaintiffs). Second, there is case law  
2 authority holding that an arbitration pending in a tribunal established by an international treaty  
3 constitutes a foreign tribunal for purposes of § 1782. *See id.* at \*17-18 (distinguishing this kind of  
4 arbitration from an arbitral tribunal established by private parties). Finally, there can be no real  
5 dispute that the ROE qualifies as an interested person because it is the respondent in the  
6 international arbitration initiated by Chevron. *See* Bloom Decl., Ex. 19 (notice of arbitration); *Intel*,  
7 542 U.S. at 256 (stating that an interested person under § 1782 “plainly reaches beyond the universe  
8 of persons designated ‘litigant,’” although there is “[n]o doubt [that] litigants are included among,  
9 and may be the most common example”).

10 D. Discretionary Factors

11 Having concluded that it has the authority to issue the subpoena, the Court now turns to the  
12 question of whether the discretionary factors identified by the Supreme Court weigh in favor of or  
13 against issuance of the subpoena. The Court makes the preliminary determination that these factors  
14 largely weigh in favor of issuance of the subpoena.

15 1. Jurisdictional Reach of Foreign Tribunal

16 The Supreme Court has noted that,

17 when the person from whom discovery is sought is a participant in the  
18 foreign proceeding . . . , the need for § 1782(a) aid generally is not as  
19 apparent as it ordinarily is when evidence is sought from a  
20 nonparticipant in the matter arising abroad. A foreign tribunal has  
jurisdiction over those appearing before it, and can itself order them to  
produce evidence. In contrast, nonparticipants in the foreign  
proceeding may be outside the foreign tribunal’s jurisdictional reach;  
hence, their evidence, available in the United States, may be  
unobtainable absent § 1782(a) aid.

22 *Id.* at 264. In the instant case, Mr. Borja is not a party in the international arbitration, and therefore  
23 this factor weighs in the ROE’s favor. *See In re Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034, at  
24 \*20 (noting that Ecuadorian court and international arbitral tribunal lacked jurisdiction to compel the  
25 individual, who was located in the district and not a party to the foreign proceedings, to produce the  
26 material sought).

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1           2.       Nature and Receptivity of Foreign Tribunal

2           There is no evidence before the Court that the international arbitral tribunal at issue here is  
3 either receptive or nonreceptive to U.S. federal-court jurisdictional assistance, and therefore this  
4 factor is essentially neutral.

5           The Court does note, however, that Chevron has made § 1782 requests before other U.S.  
6 federal courts for use in the international arbitration at issue and does not appear to have made any  
7 contention that the arbitral tribunal would not be receptive to such. Moreover, several of those  
8 courts have authorized subpoenas under § 1782. *See, e.g., Chevron Corp. v. Stratus Consulting,*  
9 *Inc.*, No. 10-cv-00047-MSK-MEH, 2010 U.S. Dist. LEXIS 46778, at \*5-6 (D. Colo. Apr. 13, 2010)  
10 (noting that “Judge Kane held a hearing on the Section 1782 petition . . . and granted the issuance of  
11 the subpoenas with leave for the filing of any motions to quash within thirty days”); *In re Chevron*  
12 *Corp.*, 2010 U.S. Dist. LEXIS 47034, at \*20-21, 24 (concluding that discretionary factors satisfied);  
13 *In re Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB, slip op. at 9 (N.D. Ga. Mar. 2, 2010) (located  
14 at Bloom Decl., Ex. 53) (stating that “[s]ection 1782 has . . . been applied to authorize discovery for  
15 matters subject to international arbitration, like the [international arbitration here]”). Finally, the  
16 Court takes note that even opposition by the international arbitral tribunal would not necessarily  
17 carry the day. *See In re Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034, at \*21 & n.51 (pointing out  
18 that, in *Intel*, the European Commission stated that it did not need or want the U.S.-federal court  
19 assistance).

20           3.       Attempt to Circumvent Foreign Proof-Gathering Restrictions and Policies

21           There is nothing to suggest that the ROE’s § 1782 request is an attempt to circumvent  
22 foreign proof-gathering restrictions. Indeed, it does not appear that the international arbitral tribunal  
23 at issue here could compel Mr. Borja to provide evidence because he is not a party to the  
24 international arbitration. *See id.* at \*22 (applying same reasoning). Accordingly, this factor weighs  
25 in the ROE’s favor.

26           4.       Undue Intrusion or Burden

27           In its papers, the ROE explains that it wishes to subpoena Mr. Borja (both to provide  
28 testimony and produce documents) because Chevron has implicated Mr. Borja as a witness in its

1 allegations that the ROE’s “judicial branch has conducted the Lago Agrio Litigation in total  
2 disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due process  
3 and natural justice rights, and in apparent coordination with the executive branch and the Lago  
4 Agrio plaintiffs.” Docket No. 19 (Not. ¶ 4). For example, as reflected in its notice of arbitration for  
5 the international arbitration, Chevron claims as follows:

52. Judge Nunez [the presiding judge in the *Lago Agrio* lawsuit] has made statements to third parties, unrelated to the *Lago Agrio* Litigation, indicating a pre-disposition of the outcome of the case. In April 2009, two individuals pursuing business opportunities in Ecuador – an Ecuadorian named Diego Borja and a U.S. citizen named Wayne Hansen – were invited to meet with Judge Nunez in connection with potential remediation projects to be funded with the proceeds of a judgment against Chevron. Two meetings were arranged between Messrs. Borja and Hansen and Judge Nunez. During these meetings, while the *Lago Agrio* Litigation was still in its evidentiary phase and additional filings by the parties were still to be made, Judge Nunez was recorded stating that he would issue a ruling in late 2009 finding Chevron liable and that the appeals would be a formality.
  53. Messrs. Borja and Hansen also were invited to meet in the offices of Ecuador’s ruling Alianza PAIS party with persons including Patricio Garcia, who identified himself as a political coordinator for the party. Mr. Garcia was recorded stating that the remediation contracts would be awarded in exchange for a bribe which was to be divided between Judge Nunez, the office of the Presidency of Ecuador and the *Lago Agrio* plaintiffs. Mr. Garcia also stated that the legal advisor of the Ecuadorian President’s office, Alexis Mera, had given instructions as to how the proceeds of the supposed *Lago Agrio* judgment against Chevron were to be routed, and that the executive branch was involved in drafting Judge Nunez’s decision.

21 | Bloom Decl., Ex. 19 (Not. ¶¶ 52-53).

According to the ROE, there is evidence (*i.e.*, the alleged conversations between Mr. Borja and Mr. Escobar) suggesting that Mr. Borja was not an innocent third party who just happened to learn of the alleged bribery scheme but rather was a long-time associate of Chevron whom Chevron would pay for any favorable testimony. The ROE also maintains that the same evidence indicates that Mr. Borja has evidence in his possession, custody, or control that would be incriminating to Chevron. Accordingly, in the proposed subpoena, the ROE asks Mr. Borja to provide testimony and to produce documents, including documents relating to his employment or affiliation with Chevron,

1 his wife's employment or affiliation with Chevron, payments received from Chevron, meetings with  
2 Chevron, communications with Chevron, communications with Mr. Hansen, communications with  
3 Mr. Escobar, and the *Lago Agrio* litigation.

4 At this juncture, the Court is satisfied the ROE has made a *prima facie* showing that the  
5 information it seeks from Mr. Borja has, as a general matter, some relevance to the international  
6 arbitration given the allegations made by Chevron in its notice of arbitration and the alleged  
7 conversations between Mr. Escobar and Mr. Borja.<sup>2</sup> And given the relevance of the information, it  
8 is arguably less likely that issuance of the subpoena will result in undue intrusion or burden to Mr.  
9 Borja. The final discretionary factor thus weighs in favor of issuance of the subpoena. That being  
10 said, the Court's ruling here does not preclude Mr. Borja – or for that matter Chevron – from  
11 contesting the subpoena based on undue intrusion or burden or based on other grounds (*e.g.*,  
12 overbreadth).

## 13 II. CONCLUSION

14 For the foregoing reasons, the Court grants the ROE's application. The ROE may serve the  
15 subpoena (attached to this Order).

16 This Order disposes of Docket No. 1.

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18 IT IS SO ORDERED.

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20 Dated: September 15, 2010

21   
22 EDWARD M. CHEN  
23 United States Magistrate Judge

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27 <sup>2</sup> The Court makes no finding as to whether these conversations are authentic. The ROE,  
28 however, has provided evidence – *i.e.*, an investigative report – to support its contention that the  
conversations are. *See* Bloom Decl., Ex. 45, at 1 (investigative report).